

DOCUMENT RESUME

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[Protest against Rejection of Bid as Nonresponsive]. B-189142.
August 3, 1977. 4 pp.

Decision re: M. A. Barr, Inc.; by Robert F. Keller, Deputy
Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: General Government: Other General Government
(806).

Organization Concerned: Department of the Army: Corps of
Engineers, Omaha, NE.

Authority: A.S.P.R. 2-404.2(d)(i). A.S.P.R. 2.405. 53 Comp. Gen.
32. 53 Comp. Gen. 34. 53 Comp. Gen. 320. B-183799 (1975).
B-185106 (1976). B-186652 (1976). B-182604 (1975). B-187345
(1976). B-187356 (1976). B-185058 (1976). B-185265 (1976).
B-181801 (1974).

The protester objected to the rejection of its bid as nonresponsive. If a bid is subject to two reasonable interpretations, under one of which it would be responsive and under the other nonresponsive, the bid must be rejected as ambiguous. Where a telex modification of bid prices does not indicate whether a qualification in the original bid price is deleted from the bid, the bid is ambiguous. A bid qualification violating the solicitation requirement for submission of a firm fixed price is nonresponsive. (SC)

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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

FILE: B-189142

DATE: August 3, 1977

MATTER OF: M. A. Barr, Inc.

DIGEST:

1. Where bid is subject to two reasonable interpretations, under one of which it would be responsive and under the other nonresponsive, bid must be rejected as ambiguous. Notation in bid "brick allowance \$135/1000 * * *" is subject to interpretation that firm fixed price is not contemplated and bid price is subject to future increased costs in brick prices and such bid may not be considered.
2. Where telex modification of bid prices does not indicate whether qualification in original bid price is deleted from bid, bid is ambiguous as it is reasonably susceptible of two varying interpretations, one of which renders bid nonresponsive. It would be prejudicial to other bidders to permit bidder who created ambiguity to select after bid opening interpretation to be adopted.
3. Bid qualification violating solicitation requirement for submission of firm fixed price is non-responsive to material requirement and even though qualification applied only to materials valued at \$2,160 and next low bid was approximately \$8,000 higher, deviation is material and not waivable under ASPR § 2-405.

M. A. Barr, Inc. (Barr) protests the rejection of its bid as nonresponsive by the Army Corps of Engineers, Omaha District (Corps). Invitation for bids (IFB) No. DACA45-77-B-0044 was issued on March 18, 1977, for the construction of a police security building at the Minneapolis-St. Paul International Airport. Award has not been made pending resolution of this protest.

B-189142

The bid form submitted by Barr contained the handwritten notation: "Brick allowance \$135/1000 using standard block." The Corps contends that this condition goes to the substance of the bid by affecting price and allows Barr to protect itself against future increased costs. Thus, the Corps argues that Barr has failed to offer a definite fixed price rendering its bid nonresponsive. In addition, the contracting officer points out that the Government might be forced to pay Barr at the stated rate if, after award, a change in the brick requirements were made. Barr states that this notation "merely advised the contracting agency that [its] allowance for brick meeting the specifications * * * is \$135 per thousand." In any event, it argues that it reduced its price by telegram without any such notation, thereby eliminating any possible qualification.

Where a bid is subject to two reasonable interpretations, under one of which it would be responsive and under the other nonresponsive, we have consistently required the rejection of such an ambiguous bid. 53 Comp. Gen. 32, 34; *id.* 320 (1973). The question of the responsiveness of a bid concerns whether a bidder has unequivocally offered to provide the requested items in total conformance with the terms and specifications requirements of the invitation at a fixed price. A bidder's intention must be determined from the bid itself at the time of bid opening. Abbott Laboratories, B-183799, September 23, 1975, 75-2 CPD 171. Only material available at bid opening may be considered in making a responsiveness determination. Fisher-Klosterman, Inc., B-185106, March 9, 1976, 76-1 CPD 165.

Armed Services Procurement Regulation (ASPR) § 2-404.2(d)(1) (1976 ed.) requires the rejection of a bid if qualifying language in the bid envisions a possible and undetermined future change in the price bid. Chemtech Industries, Inc., B-186652, September 22, 1976, 76-2 CPD 274. Here, one reasonable interpretation of the notation in Barr's bid leads to the conclusion that the bidder has conditioned its bid on the price of brick at \$135 per thousand. If after award the price of brick increases, Barr reasonably could request additional compensation from the Government citing the brick allowance notation as justification for such an increase. Under this construction, the failure of Barr to offer a definite, fixed price,

B-189142

when required by the IFB, is a proper basis upon which to reject the bid as nonresponsive, assuming that the irregularity is not trivial or immaterial in the circumstances. Lift Power, Inc., B-182604, January 10, 1975, 75-1 CPD 13. While Barr's interpretation of the notation also may be reasonable, the reasonableness of the Corps' interpretation is obvious and goes to the substance of the bid rather than form. See ASPR § 2-404.2(d)(1) (1976 ed.), 2-405.

Moreover, we do not agree with Barr's argument that the absence of any reference to the brick allowance in its telegraphic price modification effectively deleted the qualification from its bid. The intent of the bidder must be determined from a reasonable construction of both the original bid submissions and telegraphic bid modifications. See Ulysses, Incorporated; Orlotronics Corporation, B-187345, B-187356, December 6, 1976, 76-2 CPD 464. In the instant situation, it is reasonable to retain the qualification in the original bid and still give full effect to Barr's telegraphic price modification. Where the telex modification does not indicate whether or not the notation is still in effect, the bid is ambiguous as it is reasonably susceptible of two varying interpretations. Cf. Inflated Products Co., Inc., and Brunswick Corporation, b-185058, August 9, 1976, 73-2 CPD 135. Because one interpretation of the bid renders it nonresponsive it would be prejudicial to other bidders to permit the bidder who created the ambiguity to select, after bid opening, the interpretation to be adopted. Cf. Inflated Products id.

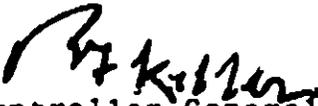
Finally Barr asserts that a brick allowance of \$135 per thousand amounts to a charge of only \$2,160 for brick while the next low bid is more than \$8,000 higher. Barr states that its bid should be accepted, citing Sierra Engineering Company, B-185265, May 26, 1976, 76-1 CPD 342.

In Sierra we held that a bid containing an allegedly ambiguous price term may be accepted where no prejudice could result to other bidders. However, in that case the bid was responsive to the solicitation's terms under either interpretation while here the bid, under one interpretation, is nonresponsive to the requirement for a firm fixed price.

B-189142

Moreover, the anticipated cost of brick is not trivial in comparison to the price difference of the two lowest bids so as to justify waiver of the deviation pursuant to ASPR § 2-405. See AFB Contractors, Inc., B-181801, December 12, 1974, 74-2 CPD 329.

For the reasons stated, Barr's bid cannot be considered and the protest is denied.


Deputy Comptroller General
of the United States